151 U S 179

RECORD, CASE No. 14,134.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 171.

CAROLINE SOUTHWORTH, EXECUTRIX OF JOHN P. SOUTHWORTH, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 5, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 21, 1893.

1 In the Court of Claims.

JOHN P. SOUTHWORTH
vs.
THE UNITED STATES. } No. 11977.

I.—*Petition. Filed December* 16, 1878.

The petition of John P. Southworth, a citizen of the United States, residing at New Orleans, in the State of Louisiana, respectfully showeth:

That in and during the year 1876 he was circuit court commissioner for the district of Louisiana, duly appointed and acting as such.

That during the time aforesaid complaints were duly made to your petitioner, as such circuit court commissioner for said district of Louisiana, as required by law, against certain persons therein named, charging them with having violated section 5512 of chap. 7 of Title Crimes of the Revised Statutes of the United States, which provides for the punishment of fraudulent registration of voters, &c.; said offence being by said section made a crime, and punishable, as provided in section 5511 of said chapter, by "a fine of not more than five hundred dollars, or by imprisonment of not more than three years, or by both."

That on such complaint being made as aforesaid, your petitioner, as such commissioner, duly issued warrants against the persons named in said complaints and therein charged with said offenses, which said warrants were, in all respects, in due form of law, and were duly issued by your petitioner as such commissioner, and by him delivered to the marshal of said district.

2 That the number of complaints made to your petitioner as such commissioner, and the number of persons therein complained of, and the number of warrants issued as aforesaid on said complanats against said persons therein named, were eight thousand two hundred and eighty-three.

That the complaints in each of the above cases were in the form as set forth in Exhibit A, hereto annexed; and the warrants issued thereon were in the form as appears by Exhibit B, hereto annexed; which said exhibits are made a part of this petition.

Your petitioner further shows, that each of said warrants were duly returned by the said marshal or his deputies, with their doings indorsed thereon; that thirteen hundred and eighty of the persons named in said war-ants were duly arrested; seventy-seven were examined and held for trial; six thousand nine hundred and three were not found; and thirteen hundred and three were examined and discharged.

That in each of said cases a docket entry was kept by your petitioner, as such commissioner aforesaid, of all proceedings had therein, as required by law, which said docket contained an entry in each case of the title of the case, viz., The United States *v.* each defendant,

naming him; the drawing of the affidavit or complaint and the date of the same; the issuing the warrant and its date; the return of the officer; the arrest and examination of the person charged in each case where arrest was made; the number of oaths administered and affidavits filed; the hearing on examinations, and all proceedings, including all services incident to the arrest and examination.

Your petitioner further says that, as such commissioner, he kept full and correct files in each case of all papers therein, including affidavits, warrants, and all papers incident to the arrest and examination of the person or persons charged with said offense.

Your petitioner further shows, that on the — day of April, 1877, he forwarded his account for such service, duly verified by his oath, to the district attorney of the said district of Louisiana, as required by law, who thereupon submitted the same in open court for the said district of Louisiana, and the said court did pass upon the same, by approving the said account to the amount of the fees charged for services in all cases wherein the persons arrested
3 had been held for trial, and by disapproving and disallowing and refusing to certify the same, as required by law, in all the other cases.

Your petitioner further shows, that thereafter, and on the — day of ——, 1877, he duly caused to be presented to the proper accounting officer of the Treasury Department of the United States his said account for settlement, and that such accounting officer refused, and still refuses, to allow said account, or to pay the same, as will more fully appear in the correspondence received from said Treasury Department, a copy of which is hereto attached, marked Exhibit D, and made a part of this petition.

Your petitioner further shows, that no assignment or transfer of said claim, or any part thereof, has been made by him; and that he is the lawful owner thereof, and entitled to have and recover from the said United States the full amount thereof, to wit, the sum of ten dollars, for his fees for his services in each of said cases above described, after allowing all set-offs, amounting in the aggregate to the sum of eighty-two thousand eight hundred and thirty dollars, as provided by section 1986 of the Revised Statutes of the United States.

Your petitioner further shows, that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in said petition are true.

Wherefore your petitioner prays judgment for the said sum of eighty-two thousand eight hundred and thirty dollars, together with costs.

JOHN P. SOUTHWORTH.

UNITED STATES OF AMERICA.

DISTRICT OF LOUISIANA, } ss:
Parish of Orleans, }

John P. Southworth, being duly sworn, doth depose and say that he is the petitioner named in the foregoing petition; that he has read the same, and knows the contents thereof, and that the same is true, of his own knowledge, except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

JOHN P. SOUTHWORTH.

4 Sworn and subscribed before me this 28th day of June, 1878.

F. A. WOOLFLEY, [SEAL.]
Comm'r U. S. Circuit Court, District of Louisiana.

John W. Bell and Carpenter & Coleman, petitioner's counsel, Washington, D. C.

The claimant's post-office address is New Orleans, Louisiana.

EXHIBIT A.

UNITED STATES OF AMERICA.

DISTRICT OF LOUISIANA, }
Parish of Orleans. }

——, ——, having been duly sworn, each for himself, on oath says, that he is a citizen of the State of Louisiana, residing in and a qualified elector of said parish of Orleans, duly registered, and that his name appears as a registered elector or voter upon the registration books of said parish for the year 1876; and they further say, each for himself, that they have made due and diligent personal inquiry for ——, registered upon the registration books of the —— ward of the city of New Orleans, No. —, and claiming to reside at No. — —— street in said ward and city; and that said —— does not reside in said —— ward or parish of Orleans aforesaid; that therefore said ——, on or about the — day of ——, 187–, did fraudulently obtain registration as aforesaid in said —— ward and parish as stated, as an elector in said ward and parish, contrary to the 21st section of act No. 155 of the session of 1874, of the General Assembly of the State of Louisiana, and contrary to and in contravention of section 5512 of the Revised Statutes of the United States.

——, ——.
—— ——.

Sworn to and subscribed on the — day of ——, 1876.

JNO. P. SOUTHWORTH.

[L. S.] *United States Commissioner of the Circuit Court in and for the District of Louisiana.*

5 EXHIBIT B.

UNITED STATES OF AMERICA,
District of Louisiana.

THE UNITED STATES
vs.
—— ——.

The President of the United States of America to the marshal of the district of Louisiana or either of his lawful deputies, Greeting:

You are hereby commanded to arrest and bring before me the body of —— ——, at my court-room, in the city of New Orleans, then and there to answer to a charge on affidavit on oath made against the said —— —— by —— —— and —— ——, registered electors of said parish of Orleans, that he, the said —— ——, on or about the — day of ——, 187–, did willfully, unlawfully, and fraudulently, obtain registration as an elector of said parish of Orleans, in the —— ward thereof, contrary to section 21 of act No. 155 of the session of 1874, of the General Assembly of the State of Louisiana, and more particularly in contravention of section 5512 of the Revised Statutes of the United States of America.

And what you do in the premises make due return to me.

Witness my hand and seal of office in the city of New Orleans, State of Louisiana, this — day of ——, 1876.

[L. S.] JOHN P. SOUTHWORTH,
United States Commissioner of the Circuit Court for the District of Louisiana.

EXHIBIT C.

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
WASHINGTON, D. C., *November* 17, 1877.

Messrs. Carpenter, Coleman & Bell, Washington, D. C.

GENTLEMEN: Your letter of the 27th ultimo to the Secretary of the Treasury was referred to this office on the 6th instant, and has been considered. The account to which it relates, being an
6 account of J. P. Southworth, United States commissioner for Louisiana, for services from October 26 to November 6, 1876, has also been referred to this office. For reasons given in the certificates of the auditor and comptroller upon said account, it cannot be allowed. Copies of the certificates are herewith.

Very respectfully, R. W. TAYLOR, *Comptroller.*

TREASURY DEPARTMENT,
FIRST AUDITOR'S OFFICE, *November* 12, 1877.

The account of J. P. Southworth, United States commissioner for the district of Louisiana, having been presented to this office for its

action, and not having been approved by the court under act of February, 1875, cannot be allowed by this office, and the same is hereby certified to the Comptroller of the Treasury for his action thereon.

(Signed) D. W. MAHON, *Auditor.*

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
WASHINGTON, D. C., *November* 16, 1877.

The account referred to in the foregoing certificate of the first auditor is for official services stated to have been performed by the commissioner from the 26th day of October to the 6th day of November, 1876. During said period of twelve days there were issued from the commissioner's office eight thousand two hundred and twenty-three warrants of arrest. Thirteen hundred and eighty of said warrants were served upon accused persons, of whom about seventy were bound over, and three or four committed to await the action of the grand jury.

Pursuant to the act of February 22, 1875, said account was submitted for approval to the United States circuit court for the district of Louisiana, and the court disapproved all charges of fees in cases where the defendants were neither committed nor held to bail. Said charges were disapproved as "not being according to law and just."

From the published opinion of the presiding judge, I learn that the reasons assigned for the disapproval were as follows: 1.
7 That a warrant of arrest must not issue without a full, candid investigation, and that the informations upon which the warrants were issued by Commissioner Southworth could not have been examined with any proper scrutiny in so short a time. 2. That most of the warrants were issued without the written signature of the commissioner; that a stamp was used in lieu thereof, and the judge inclined to the opinion that all warrants so issued were void.

The first section of the act of February 22, 1875, declares that before any account payable out of the money of the United States shall be allowed by any officer of the Treasury in favor of clerks, marshals, or district attorneys, the party claiming such accounts shall render the same to a circuit or district court, and prove to the satisfaction of the court that the services therein charged have been actually and necessarily performed. Accounts of United States commissioner- must also be submitted to a court for approval, and the court must pass upon them in the same manner as upon the accounts of the officers above named.

The account of Commissioner Southworth has not been proved to the satisfaction of the court, and it cannot be allowed by any officer of the Treasury.

The auditor having failed to act on the account, I take no further action.

R. W. TAYLOR, *Comptroller.*

8 *II.—Order of Court Reviving Suit in the Name of the Executrix. Feb'y* 20, 1882.

At a Court of Claims held in the city of Washington, February 20, 1882.

Mr. Mayer filed letters testamentary to Caroline Southworth, and it was ordered that the suit be revived in her name.

III.—Demurrer. Filed January 25, 1884.

Now comes the Attorney General on behalf of the defendants and demurs to the petition herein filed, and says that the said petition does not set out a good cause of action against the defendants.

First. Because the services set up in the petition as having been rendered, and for which claim is now made, were not the "services in each case" which are contemplated by section 1986 of the Revised Statutes.

Second. Because the approval by the United States circuit court of such a claim for services is, by virtue of section 846, Revised Statutes, and the act of February 22, 1875 (Supplement to Revised Statutes, p. 145), essential to any allowance or payment thereof; and the said claim not having been so approved does not constitute a legal claim against the United States.

THOMAS SIMONS,
Assistant Attorney General.

9 IV.—*Argument and Submission on Demurrer. February* 25, 1884.

At a Court of Claims held in the city of Washington on the 25th day of February, A. D. 1884.

The demurrer in this case was argued by Mr. Douglass, for the defendants, for the demurrer, and by Mr. Mayer, opposed, and submitted.

V.—*Demurrer Sustained, with Leave to Claimant to Amend Petition. March* 3, 1884.

At a Court of Claims held in the city of Washington on the 3d day of March, A. D. 1884.

The chief justice read the opinion of the court, and it was ordered that the demurrer of the defendants, heretofore filed, be sustained, and that the claimant have thirty days in which to amend his petition, at the end of which time, if it be not amended, it shall be dismissed.

BY THE COURT.

10 VI.—*Opinion of the Court on Demurrer. Filed March* 3, 1884.

DRAKE, *Ch. J.*, delivered the opinion of the court.

To the petition filed in this case the defendants demur. The matters presented are of sufficient magnitude to make it proper to set out in full the material parts of the petition and the exhibits connected therewith, which are as follows:

The petition of John P. Southworth, a citizen of the United States, residing at New Orleans, in the State of Louisiana, respectfully showeth:

That in and during the year 1876 he was circuit court commissioner for the district of Louisiana, duly appointed and acting as such.

That during the time aforesaid complaints were duly made to your petitioner, as such circuit court commissioner for said district of Louisiana, as required by law, against certain persons therein named, charging them with having violated section 5512 of chap. 7 of Title Crimes of the Revised Statutes of the United States, which provides for the punishment of fraudulent registration of voters, &c., said offense being by said section made a crime, and punishable, as provided in section 5511 of said chapter, by "a fine of not more than five hundred dollars or by imprisonment of not more than three years, or by both."

That on such complaint being made as aforesaid, your petitioner, as such commissioner, duly issued warrants against the persons named in said complaints and therein charged with said offenses, which said warrants were, in all respects, in due form of law, and were duly issued by your petitioner as such commissioner, and by him delivered to the marshal of said district.

That the number of complaints made to your petitioner as such commissioner, and the number of persons therein complained of, and the number of warrants issued as aforesaid on said complaints against said persons therein named, were eight thousand two hundred and eighty-three.

That the complaints in each of the above cases were in the form as set forth in Exhibit A, hereto annexed; and the warrants issued thereon were in the form as appears by Exhibit B, hereto annexed; which said exhibits are made a part of this petition.

Your petitioner further shows that each of said warrants *were* duly returned by the said marshal or his deputies, with their doings indorsed thereon; that thirteen hundred and eighty of the persons named in said warrants were duly arrested; seventy-seven were examined and held for trial; six thousand nine hundred and three were not found; and thirteen hundred and three were examined and discharged.

That in each of said cases a docket entry was kept by your petitioner, as such commissioner aforesaid, of all proceedings had herein, as required by law, which said docket contained an entry in each case of the title of the case, viz: The United States *v.* each defendant, naming him; the drawing of the affidavit or complaint,

and the date of the same; the issuing the warrant and its date; the return of the officer; the arrest and examination of the person charged in each case where the arrest was made; the number of oaths administered and affidavits filed; the hearing on examinations, and all proceedings, including all services incident to the arrest and examination.

Your petitioner further says that as such commissioner he kept full and correct files in each case of all papers therein, including affidavits, warrants, and all papers incident to the arrest and examination of the person or persons charged with said offense.

Your petitioner further shows that on the — day of April, 1877, he forwarded his account for such service, duly verified by his oath, to the district attorney of the said district of Louisiana, as required by law, who thereupon submitted the same in open court for the said district of Louisiana, and the said court did pass upon
11 the same, by approving the said account to the amount of the fees charged for services in all cases wherein the persons arrested had been held for trial, and by disapproving and disallowing and refusing to certify the same, as required by law in all the other cases.

Your petitioner further shows that thereafter, and on the — day of ——, 1877, he duly caused to be presented to the proper accounting officer of the Treasury Department of the United States his said account for settlement, and that such accounting officer refused and still refuses to allow said account, or to pay the same, except as to the accounts for the seventy-seven cases aforesaid, which were approved by the court, and were allowed and paid by the Treasury Department; as will more fully appear in the correspondence received from said Treasury Department.

* * * * * * *

Wherefore your petitioner prays judgment for the said sum of eighty-two thousand eight hundred and thirty dollars, together with costs.

EXHIBIT A.

UNITED STATES OF AMERICA.

DISTRICT OF LOUISIANA, }
Parish of Orleans. }

——, ——, having been duly sworn, each for himself, on oath says, that he is a citizen of the State of Louisiana, residing in and a qualified elector of said parish of Orleans, duly registered, and that his name appears as a registered elector or voter upon the registration books of said parish for the year 1876; and they further say, each for himself, that they have made due and diligent personal inquiry for ——, registered upon the registration books of the —— ward of the city of New Orleans, No. ——, and claiming to reside at No. — —— street, in said ward and city; and that said —— does not reside in said —— ward or parish of Orleans aforesaid; that therefore said ——, on or about the — day of ——, 187–, did

fraudulently obtain registration as aforesaid in said —— ward and parish as stated, as an elector in said ward and parish, contrary to the 21st section of act No. 155 of the session of 1874, of the General Assembly of the State of Louisiana, and contrary to and in contravention of section 5512 of the Revised Statutes of the United States.

—— ——.
—— ——.

Sworn to and subscribed on the — day of ——, 1876.

[L. S.] JNO. P. SOUTHWORTH,
United States Commissioner of the Circuit Court in and for the District of Louisiana.

EXHIBIT B.

UNITED STATES OF AMERICA, *District of Louisiana.*

THE UNITED STATES
vs.
—— ——.

The President of the United States of America to the marshal of the district of Louisiana, or either of his lawful deputies, Greeting:

You are hereby commanded to arrest and bring before me the body of ——, at my court-room, in the city of New Orleans, then and there to answer to a charge on affidavit on oath made against the said —— by —— and ——, registered electors of said parish of Orleans, that he, the said ——, on or about the — day of ——, 187–, did willfully, unlawfully, and fraudulently obtain registration as an elector of said parish of Orleans, in the —— ward thereof, contrary to section 21 of act No. 155 of the session of 1874, of the General Assembly of the State of Louisiana, and more particularly in contravention of section 5512 of the Revised Statutes of the United States of America.

And what you do in the premises make due return to me.

Witness my hand and seal of office in the city of New Orleans, State of Louisiana, this — day of ——, 1876.

[L. S.] JNO. P. SOUTHWORTH,
United States Commissioner of the Circuit Court for the District of Louisiana.

12 This petition discloses an extraordinary case.

It alleges that the claimant's testator, a circuit court commissioner for the district of Louisiana, issued, in and during the year 1876, eight thousand two hundred and eighty-three warrants against persons charged with having violated section 5512 of the Revised Statutes, by fraudulently registering as voters in the city of New Orleans.

It does not state within what portion, or between what dates, of that year that great number of warrants was issued. If their issue

extended through the 313 week-days of the year, then the daily issue averaged about 26; if through half a year, 52; if through three months, 106; if through two months, 159; and if through one month, 319. Taking any of the periods named, it was certainly a remarkable amount of work; probably the most so ever done by a circuit court commissioner in that line.

For 77 of the cases in which those warrants were issued, and wherein the parties were arrested and examined before him, the commissioner was paid at the Treasury; for the remaining 8,206 his executrix asks judgment for $82,060; that is, $10 in each case; though 6,903 of the persons named in the warrants were not found, and 1,303 were examined and discharged. If the law required us to allow him that amount, we would not hesitate to do it, though it be greater than the combined salaries, for one year, of eight associate justices of the Supreme Court of the United States, and nearly as much as the salaries for four years of all the members of this court.

By section 1982, of the Revised Statutes, "commissioners appointed by the circuit courts, with power to arrest, imprison, and bail offenders * * * are authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of chapter seven of the title 'Crimes,' and to cause such persons to be arrested, and imprisoned or bailed, for trial before the court of the United States * * * having cognizance of the offense."

Chapter seven of the title "Crimes," relates to "crimes against the elective franchise and civil rights of citizens;" and it contains section 5512, which provides, *inter alia*, for the punishment of any one fraudulently registering as a voter. It was under this section that the 8,283 warrants were obtained.

The amount claimed for issuing those warrants and for proceedings thereunder, is assumed by the claimant to be justified by section 1986, which reads thus:

SEC. 1986. The district attorneys, marshals, their deputies, and the clerks of the courts of the United States and territorial courts shall be paid for their services, in cases under the foregoing provisions, the same fees as are allowed to them for like services in other cases; and where the proceedings are before a commissioner he shall be entitled to a fee of ten dollars for his services in each case, inclusive of all services incident to the arrest and examination.

The point is, whether under this provision the claimant's testator became entitled to $10 for each of the warrants he issued. It is contended that when a complaint under oath was made before him, charging a person with having fraudulently registered, and he issued a warrant for the arrest of such person, a "case" was made, within the meaning of this section, authorizing him to charge the United States $10, whether the person named in the war-
13 rant was found or not; or, if found, whether he was committed or discharged. At the argument the contention *pro* and *con.* was as to whether that made a "case." We do not stop to consider that matter, for there are other grounds, fundamental in

their character, upon which we can more satisfactorily base a conclusion.

We do not suppose it would be questioned by any intelligent legal mind, that, to entitle a commissioner to "a fee of $10 for his services in each case," he must show as the very corner-stone of the foundation of his right, that the "proceedings" before him, which he avers made a "case" in which he might demand that fee, were taken by authority of and in conformity to the statute authorizing those "proceedings." Most manifestly the United States do not, by statute or otherwise, agree to pay any of their officers, legislative, executive, or judicial, a fee for doing an unlawful or unauthorized act. Fees are intended as a compensation to a public servant for the lawful performance of the duties of his office. For anything done by him *colore officii*, but in fact unlawfully, he can have no right to demand a fee from the government whose authority he has wrongfully attempted to exercise. This, in our opinion, is just what, by the showing of the petition, the claimant's testator did in the 8,206 cases, for each of which a fee of $10 is now demanded. Quite opportunely we are enabled to show this on demurrer, because the petition, with the exhibits annexed to and made part thereof, puts the whole matter before us in all its essential features.

The "proceedings" before John P. Southworth, as commissioner, appear on their face to have been instituted under section 5512 of the Revised Statutes. The petition avers that the complaint in each of the cases was in the form set forth in Exhibit A, annexed thereto; and that the warrants issued on the complaints were in the form shown in Exhibit B, also thereto annexed.

Section 5512 defines a number of offenses to which we need not refer in this connection. Omitting all of it but what refers to a man's fraudulently registering as a voter, it reads as follows:

SEC. 5512. If at any registration of voters for an election for representative * * * in the Congress of the United States, any person fraudulently registers, * * * not having a lawful right so to do, every such person shall be punishable as prescribed in the preceding section.

It will be at once noticed that, inasmuch as the laws of the United States nowhere provide for a "registration of voters for an election for representative in the Congress of the United States," there could, under that section standing alone, be no possibility of any person fraudulently registering for such an election. Hence, doubtless, the adoption of section 5513, in these words:

SEC. 5513. Every registration made under the laws of any State, for any State or other election at which such representative * * * in Congress may be chosen, shall be deemed to be a registration within the meaning of the preceding section, notwithstanding such registration is also made for the purposes of any State, Territorial, or municipal election.

The effect of this was as if section 5512 had been made to read thus:

If at any registration of voters made under the laws of any State, for any State or other election at which a representative in Congress

may be chosen, any person fraudulently registers, not having a lawful right so to do, every such person shall be punishable as prescribed in the preceding section.

14 Assuming this to be what the two sections, fused, would express, the first inquiry is for the elements of an offense against section 5512. No better method of reaching a satisfactory answer could probably be found, than to see what should appear in an indictment charging a defendant with having fraudulently registered; for the rule laid down by Bishop would not, we suppose, be anywhere disputed, that every individual thing which the law has specified as constituting any part of the foundation for the punishment of a crime, must be set down in allegation in the indictment. (1 Bishop on Crim. Proc., § 86.)

Applying that rule here, we are of the opinion that, under that section, an indictment for fraudulent registration should show the following particulars:

1. That there was a registration of voters;
2. That it was a registration made under the laws of a State;
3. That it was a registration for a State or municipal election;
4. That the election for which the registration was made was one at which a representative in Congress might be chosen;
5. That the party caused himself to be registered as a legal voter;
6. That he had not a lawful right so to do;
7. That, not having that lawful right, he nevertheless, with fraudulent intent, had himself registered as a legal voter.

Of these several elements of the offense how much ought to appear in a complaint made before a commissioner accusing a man of fraudulently registering as a voter? In our opinion, the complaint should contain all of them; not necessarily in the order or mode of statement we have used, nor with the minute fullness and technical exactness of an indictment, but with enough fullness and exactness to describe accurately and sufficiently every element of the alleged offense.

Applying these views to the form of complaint annexed to the petition, and averred to be the one used in all the cases for which Southworth's executrix now seeks compensation, we are clear in holding that a complaint in the terms of that form did not allege any violation of section 5512 of the Revised Statutes, and therefore did not authorize the issue of a warrant for the arrest of the accused. Viewed as a legal document, it is more remarkable for its omissions than for its contents. It omits to allege that the registration at which the accused is supposed to have registered, was a registration made under the laws of the State of Louisiana. It omits to allege that it was a registration for a State or other election. It omits to allege the vital fact that the registration was for an election at which a representative in Congress might be chosen; without the existence of which fact section 5512 gave a commissioner not the least power to entertain any such complaint. It omits to allege that the accused himself procured his registration. For ought that appears, his name may have been put on the registration book by another person, without his knowledge; and possibly for the very purpose of after-

wards instituting criminal proceedings against him under this law. It omits to allege that he had not a lawful right to register. It omits to allege, except argumentatively and inferentially, that he "fraudulently registered."

With all these matters omitted, what was the complaint? Simply this:—Two men swear, that the accused was registered upon the registration books of a certain ward, claiming to reside at
15 No. — in —— street, in that ward; that they, the swearers, have made "due and diligent personal inquiry" for the accused; that the accused does not reside in that ward; and that therefore the accused, on or about the — day of —— did fraudulently obtain registration as aforesaid in said ward.

Extended comment on this production is unnecessary. But it is fit that we should note its defects (in addition to the above-mentioned omissions) as a foundation for warrants to arrest, not one, or ten, or fifty, or a hundred, or five hundred, but eight thousand two hundred and eighty-three men, for fraudulent registration as voters.

It fails to aver that at the time when the name of the accused was put on the registration book he did not reside at the place there stated as his residence; but says that he "does not reside in said —— ward or parish;" that is, does not now, at the time the complaint is sworn to. This does not even distantly tend to prove that, when registered, he did not reside at the place named in the book.

Again: The complainers do not swear that they have knowledge of the fact that he "does not reside in said —— ward or parish," but that "they have made due and diligent personal inquiry for" the accused, and that he does not reside in said ward or parish; the allegation of his non-residence there being, presumably, the result of that inquiry. When or of whom they inquired does not appear. Where they pursued their inquiry is equally unstated; when of all things it might be expected that they would have inquired at the house indicated on the registration books. But as that would have required a visit to thousands of houses, the shorter way was to make personal inquiry, each complainer of the other perhaps, or of casual passers-by, or of the city directory, and decide for themselves that, in law, that "personal inquiry" was "due and diligent."

But we need not pursue this matter further. The complaint, as the initiative of a criminal prosecution, which might result in fine and imprisonment of the accused, is conspicuously destitute of validity or vitality, and could not possibly justify the issue of a warrant of arrest. And yet upon just such complaints the claimant alleges that her testator issued 8,283 warrants for the arrest of that number of men, each to answer the grave charge of having "willfully, unlawfully, and fraudulently obtained registration as an elector of said parish of Orleans, in the —— ward thereof, * * * in contravention of section 5512 of the Revised Statutes of the United States of America." The issue of those warrants was, in our unhesitating opinion, an entirely unlawful act on the part of the claimant's testator, upon which no claim on the Government can be based; and therefore, the demurrer to the petition is sustained.

Nott, J., did not sit at the hearing of the argument on this demurrer, and took no part in the decision of the question.

16 VII.—*Amendment to Petition. Filed April* 3, 1884.

Claimant amends his petition herein by adding thereto the following:

In accordance with the provisions of the laws of Louisiana, namely, of act No. 150 of the session laws of the General Assembly of Louisiana for the year 1874, a registration of voters was duly held in the State of Louisiana for an election to be held under the laws of said State, on, to wit, the — day of ——, 1876, at which said election, under the laws of said State and of the United States, representatives in the Congress of the United States were to be voted for. That under the said laws of said State each person who presented himself to the duly authorized registering officer for registration was required to make affidavit as to the place of his residence, and, if in a city or town, to designate under oath the house in which he resided by the name of the street on which it was situated and its number on said street, and each of the persons against whom the said complaints were made, as aforesaid, had presented himself for registration, as aforesaid, and had made said affidavit that he resided in a house on a certain street and of a certain number in the city of New Orleans, and nowhere else; that a record of the persons so registered, with the places of their respective residences, as aforesaid, was by said laws required to be kept and was kept by said registering officers, the said records being public, and that the persons who made the complaints on which said warrants were issued knew of said records and of the statements they contained in relation to the places of residence of the persons, respectively, who are charged by them in said complaints with having falsely registered by giving as their place of domicile and residence places
17 at which they did not in fact reside; that each of the said persons who made oath to the said complaint did so after inquiry and investigation had been made by them at and about the said alleged places of residence of the said persons whom they charge, in said complaints, with having falsely registered by respectively making false statements, as aforesaid, as to their places of residence, and learning, by said investigations and inquiries, that the said persons did not at the time of said investigation and inquiry, as aforesaid, reside where they had stated in their said registration affidavits, made a short time, to wit, twenty days, previous to said investigation, that they did reside; that the said election for which said registration was held had not occurred at the time of the making of said complaints and the issuance of the warrants thereon, and the residences of the said persons as given by them at the times of registration, as aforesaid, had not been changed on their application or otherwise on the said registration records, thus giving the said Southworth, as such commissioner, probable cause to believe that each of the said per-

sons charged in said complaints had falsely, fraudulently, and unlawfully caused himself to be registered as a lawful voter.

ABRAHAM & MAYER,
Claimant's Attorneys.

COUNTY OF ——,
State of Connecticut.

Caroline Southworth, on being duly sworn, deposes and says that she is the executrix of the estate of John P. Southworth, deceased, and the claimant in the above-entitled cause; that the facts alleged in the foregoing amendment to the original petition of claimant in said cause, the said amendment having been filed in said court on April 3, 1884, are true to the best of her knowledge and belief.

MRS. CAROLINE SOUTHWORTH.

Sworn to and subscribed before me this 5th day of April, 1884.

DAVID B. BOODY,
Judge of Probate.

18 VIII.—*Demurrer to Amended Petition. Filed March* 9, 1889.

And now come the said defendants, by their Attorney General, and, demurring to the amended petition in this cause, state as the ground thereof that the said amended petition does not allege facts sufficient to constitute a cause of action.

ROBERT A. HOWARD,
Ass't Att'y General.

IX.—*Submission on Demurrer. Oct.* 28, 1889.

At a Court of Claims held in the city of Washington on the 28th day of October, 1889.

The demurrer herein was submitted by Mr. Assistant Attorney General Cotton, for the demurrer, and by Mr. King opposed.

19 X.—*Demurrer Sustained and Petition Dismissed. November* 4, 1889.

CAROLINE SOUTHWORTH, Executrix of John P. Southworth, Dec'd,
vs.
THE UNITED STATES. } No. 11977.

At a Court of Claims held in the city of Washington on the 4th day of November, A. D. 1889.

In this case it was ordered that the demurrer of the defendants be sustained and the petition of the claimant, Caroline Southworth, executrix of John P. Southworth, deceased, be dismissed for reasons stated by the court in its opinion upon the demurrer to the original petition.

BY THE COURT.

20 XI.—*Application of Claimant for and Allowance of Appeal.*

CAROLINE SOUTHWORTH, Executrix of the Last Will and Testament of John P. Southworth, Dec'd,
vs.
THE UNITED STATES. } No. 11977.

From the judgment rendered in the above-entitled cause on the 4th day of November, 1889, dismissing the claimant's petition the claimant, Caroline Southworth, executrix of the last will and testament of John P. Southworth, deceased, by her attorney of record, Lewis Abraham, makes application for and gives notice of an appeal to the Supreme Court of the United States.

LEWIS ABRAHAM,
Att'y of Record.
GEORGE A. KING, *Of Counsel.*

Filed and allowed in open court.
November 11, 1889.

WILLIAM A. RICHARDSON,
Chief Justice.

21 In the Court of Claims.

CAROLINE SOUTHWORTH, Executrix of John P. Southworth, Dec'd,
vs.
THE UNITED STATES. } 11977.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the order of March 3, 1884, sustaining the demurrer filed by the defendants and of the opinion of the court thereon and of the judgment of the court entered November 4, 1889, dismissing petition on demurrer and of the application of claimant for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 20th day of May, A. D. 1890.

Seal Court of Claims.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 14,134. Court of Claims. No. 171. Caroline Southworth, executrix of John P. Southworth, deceased, appellant, *vs.* The United States. Filed September 5, 1890.

Office Supreme Court U. S.
FILED.
DEC 8 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 171.

CAROLINE SOUTHWORTH, Executrix of JOHN P. SOUTHWORTH, Deceased, Appellant,

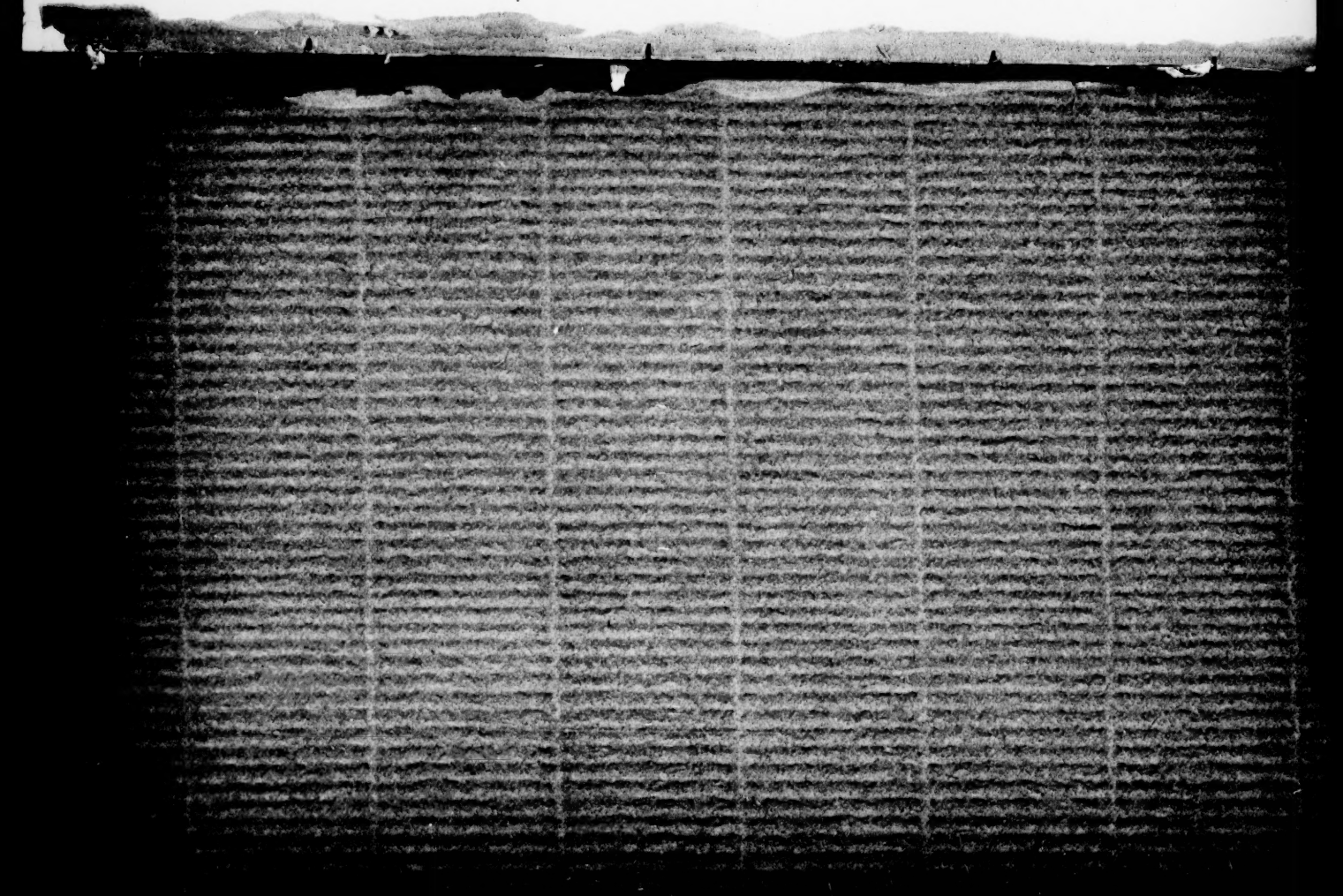
v.

THE UNITED STATES.

BRIEF FOR APPELLANT.

LEWIS ABRAHAM,
GEORGE A. KING,
Attorneys for Appellant.

McQUEEN, PR.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

CAROLINE SOUTHWORTH, Executrix of JOHN P. SOUTHWORTH, Deceased, *Appellant*, v. THE UNITED STATES. } No. 171.

BRIEF FOR APPELLANT.

I. Statement of the Case.

John P. Southworth, on the 16th of December, 1878, filed his petition in the Court of Claims (pp. 1, 2) claiming fees as United States Commissioner for his services in certain cases heard by him for violations of section 5512 of the Revised Statutes of the United States. That section provides for the punishment of any person fraudulently registering as a voter. Section 1982 authorizes and requires commissioners to institute prosecutions against all persons violating the provisions of chapter 7, which contains section 5512, and section 1986 allows the commissioner "a fee of $10 for his services in each case,

inclusive of all services incident to the arrest and examination." The sections are set out in full in the opinion of the Court below, pp. 10, 11.

In the year 1876 complaints were made to said Southworth as commissioner of the Circuit Court of the United States for the District of Louisiana against eight thousand two hundred and eighty-three persons for violations of section 5512, and he issued a warrant for the arrest of each one. One thousand three hundred and eighty of the persons named in the warrants were arrested, of whom on examination seventy-seven were held for trial, and one thousand three hundred and three were examined and discharged. The remaining six thousand nine hundred and three were not found.

The commissioner duly presented his account to the court for approval, as required by the act of February 22, 1875, 1 Supplement to Revised Statutes, 65, and the court approved the account to the amount of the fees charged in all cases wherein the persons arrested had been held for trial, but disapproved the remainder. None of the account, however, was paid by the Treasury Department.

The claim was, under Rev. Stat. section 1986, at the rate of $10 a case, amounting to $82,830. The affidavit of complaint (p. 3), the warrant (p. 4) and the rulings of the officers of the Treasury (pp. 4, 5) were set out as exhibits to the petition.

Pending the prosecution of the suit Southworth died, and his executrix, Caroline Southworth, the present appellant, was duly substituted as claimant, p. 6.

The Attorney-General, on January 25, 1884, filed a demurrer to the petition on the following grounds (p. 6):

"First. Because the services set up in the petition as having been rendered, and for which claim is now made,

were not the 'services in each case' which are contemplated by section 1986 of the Revised Statutes.

"Second. Because the approval by the United States Circuit Court of such a claim for services is, by virtue of section 846, Revised Statutes, and the act of February 22, 1875 (Supplement to Revised Statutes, p. 145), essential to any allowance or payment thereof; and the said claim not having been so approved does not constitute a legal claim against the United States."

On the hearing of this demurrer it was sustained by the court, with leave to amend the petition in thirty days, p. 6.

The opinion by the late Chief Justice Drake, pp. 7 to 13, does not base the action of the court upon either of the grounds assigned in the demurrer, but upon the insufficiency of the affidavit of complaint to justify the issuance of a warrant.

In accordance with the leave granted, an amendment to the petition was filed April 13, 1884 (pp. 14, 15), setting out further particulars of the facts of registration, and the inquiries made by the complaining witnesses.

A demurrer was filed to the amended petition March 19, 1889 (p. 15), and November 4, 1889, the demurrer was sustained and the petition dismissed for the reasons given by the court in its opinion upon the demurrer to the original petition (p. 15).

From this judgment the claimant appeals (p. 16).

II. Assignment of Errors.

The appellant hereby assigns as error in the rulings and judgment of the Court of Claims that said court sustained the demurrer to the original and amended petitions, and rendered judgment in favor of the United States, whereas said demurrer should have been overruled and judgment rendered for the claimant.

III. Brief of Argument.

The second ground of demurrer, which is the absence of an approval of the account by the circuit or district court, is disposed of by the decision of this court in *United States* v. *Knox*, 128 U. S. 230, holding that such an approval is not essential to the maintenance of a suit upon a claim of this character. This ground, therefore, need not be further considered.

Were the services performed by the commissioner, as set out in the petition, performed in a "case" within the meaning of section 1986 of the Revised Statutes? This is the question raised by the first ground of demurrer. If that is decided in favor of the claimant, it remains to be considered whether those services were performed in a lawful manner, or whether, as held by the Court of Claims, the commissioner acted unlawfully in issuing warrants of arrest upon such complaints as those set out in this record.

It may be here observed that objections to this claim, based as the Court of Claims apparently does them, upon the great number of the warrants issued, or the proportion executed wherein the defendants were held to answer are irrelevant to the issues now before the court. When the case comes up for trial on its merits it will be time to consider whether these proceedings were instituted and warrants issued by the commissioner from a sense of duty, and in the due exercise of the judicial discretion vested in him, or corruptly, and with a view solely to making fees.

In the case of *Osborn* v. *United States Bank*, 9 Wheat. 738, Chief Justice Marshall defines what is a case within the terms of the Constitution, and he holds that such a case exists "when any question" respecting the constitution, laws or treaties "shall assume such a form that the

judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case," etc.

The same view is taken in *Counselman* v. *Hitchcock*, 142 U. S. 547, where it is held that an investigation before a grand jury is a "case." Nor is the decision of this court at the present term in the case of *The United States, Appellant,* v. *John T. Patterson*, No. 951, at all inconsistent with this view. It is there conceded that the services of a commissioner in deciding upon an affidavit of complaint whether a warrant shall issue are of a judicial nature, and all that is held is that they do not constitute a hearing and deciding on criminal charges within the meaning of Section 847 of the Revised Statutes. But the language of Section 1986 is much broader and allows the fee of $10 wherever there is a "case."

Following Chief Justice Marshall's definition of the word "case," we find that the judicial power was capable of acting on each of the cases in question, and did so act when the commissioner judicially decided upon the sufficiency of the complaint in each case, and issued his warrant therein. His decision to issue the warrant and its issuance were the result of the exercise of judicial discretion and power. The language of Section 1986 is: "Where the proceedings are before a commissioner he shall be entitled to $10 for his services in each case, inclusive of all services incident to the arrest and examination." These words clearly show that there were other services in contemplation by Congress exclusive of and in addition to "services incident to the arrest and examination," and, therefore, it was provided that in case there was an arrest, or examination, or both, in addition to the other services, the fee should still be only $10. There is no provision that there shall be no fee unless there is an

arrest and examination, but there is a clear recognition of the fact that a case could exist and services be rendered therein in the absence of either an arrest or an examination.

The position that the purpose of this law, in so far as it related to the fees of commissioners, was to discourage the institution of proceedings, will not bear a moment's examination. On the contrary, the purpose was clearly to encourage the institution of such proceedings, and, indeed, to command and enforce their institution and prosecution upon the marshals, commissioners, district attorneys and clerks. The provision in relation to commissioners' fees is found in "An act to protect all persons in their civil rights, etc," approved April 9, 1866 (14 U. S. Stat. 27). Sections 4, 5 and 6 of this act were substantially embodied in the act "to enforce the right of citizens of the United States to vote, etc.," approved May 31, 1870 (16 U. S. Stat. 140), as Sections 9, 10 and 11 of the latter act.

But section 7 of the former act, in so far as it relates to the compensation of commissioners, was not embodied in the later act, but the fees of the commissioners (by section 12 of the later act) were made the same as in other cases. The Revised Statutes, however, give to commissioners, for services of the kind rendered by claimant, the fees prescribed by the former act, and this being the law we must look to the act wherein the language was used in order to arrive at the intention of Congress.

The historical circumstances alone which induced the passage of both the acts, and which are familiar to the court, would probably be sufficient to satisfy the court that it was the purpose of Congress to increase the fees of the commissioner in order to encourage prosecutions thereunder. But an examination into the provisions of the act will leave no room for doubt on this point.

By section 4 all of the officers who have any duties to perform under the act are "specially authorized and required" to perform the same; the President is especially empowered to authorize officers to perform duties thereunder, and the courts of the United States are enjoined to increase the number of commissioners where necessary to the prompt and efficient prosecution of offenders under the act.

By section 5 a special penalty is imposed on a marshal or deputy who shall refuse to receive or diligently execute a warrant under the act; the extraordinary power of appointing persons to execute their process is given to commissioners, and they are empowered to summon the posse comitatus, the land and naval forces of the United States, or the militia; the warrants of the commissioners run throughout the State or Territory in which issued.

By section 6 special penalties are prescribed for obstructing process under the act.

By section 7 the commissioner is given the ten-dollar fee (see sec. 1986 R. S.), and persons authorized to execute the warrants of the commissioner are allowed five dollars for each warrant executed, with such other fees as the commissioner may allow for services incident to the arrest.

By section 8, for the purposes of the act the President is empowered to require courts of the United States to be held by the judge at any place within the latter's territorial jurisdiction.

If, however, it be held that the proceedings in the cases in which no arrests were ever made do not constitute a *case*, the commissioner would still be entitled to *some* payment for those services. For the issuance of each warrant he would by section 847 be entitled to a fee of $1, and perhaps also to fees under the same section for drawing the affidavit of complaint, administering

the oath to the same, filing the affidavit, and filing the warrant with the marshal's return thereon; and perhaps also under the decision of this court in *United States* v. *Wallace*, 116 U. S. 398, to a docket fee of $1. It is true the petition does not claim the fees under section 847, but only under section 1986, but under similar circumstances this court said in *Clark* v. *United States*, 95 U. S. 539, 543: "If objected that the petition contains no count upon an implied contract for *quantum meruit*, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived."

The objections raised by the demurrer having been disposed of, it remains to consider the wholly different ground upon which the Court of Claims proceeded in its action sustaining the demurrers to both the original and amended petition. It is certainly unusual, and almost extraordinary, to question the jurisdiction or power of a committing magistrate over a particular case where the offense charged is clearly one of which he has jurisdiction, upon the ground of a mere insufficiency in the affidavit of complaint in its allegations of the particulars of the offense. The affidavits of complaint (p. 3), distinctly charge a violation of section 5512 of the Revised Statutes. But it is said that the facts stated in the affidavit are not sufficient to warrant a conclusion that a violation of section 5512 had actually been committed. This, it may be remarked, is precisely what the law confided to the discretion of the commissioner. So long as an offense against the laws of the United States was distinctly charged in the affidavit of complaint, all that was required was that the magistrate be satisfied that

there was probable cause to believe the defendant guilty of the offense. Bishop's Criminal Procedure, sections 230, 233.

In all matters relating to the prosecution of crimes the common law of England was adopted as the law of Louisiana. All that is required is an oath as to the facts or circumstances raising a presumption of guilt. *Maguire* v. *Hughes*, 13 La. Ann. 281. And the following remarks of the Supreme Court of Alabama are quite in point: "In preliminary proceedings of this nature, which are usually had before justices of the peace, technical accuracy can not be expected and is not required. It is sufficient if, giving to the language employed its ordinary signification, the court may gather from it that an offense against the criminal law has been committed or attempted. If such proceedings were to be subjected to the rigid rules of criticism, and all the constituent elements of the offense sought to be investigated, were required to be set forth in the affidavit or warrant with certainty, the administration of the criminal law would be greatly embarrassed, and offenders would often go unpunished, by reason of the hazard which the justice who issues, the party who procures, and the officer who executes the warrant for arresting them would incur. We must be content to gather the meaning of the party from the affidavit, and disregard the want of technical accuracy of description." *Crosby* v. *Hawthorn*, 25 Ala. 223.

In *State* Ex rel. *Bassetti* v. *Second Recorder's Court*, 44 La. Ann. 1093, the Supreme Court of Louisiana seems to have held that only a very slight degree of particularity was required in an affidavit on which a criminal prosecution was to be based.

In this case the amended petition sets out, pp. 14, 15:

"In accordance with the provisions of the laws of Louisiana, namely, of act No. 150 of the session laws of

the General Assembly of Louisiana for the year 1874, a registration of voters was duly held in the State of Louisiana for an election to be held under the laws of said State, on, to wit, the day of , 1876, at which said election, under the laws of said State and of the United States, representatives in the Congress of the United States were to be voted for. That under the said laws of said State each person who presented himself to the duly authorized registering officer for registration was required to make affidavit as to the place of his residence, and, if in a city or town, to designate under oath the house in which he resided by the name of the street on which it was situated and its number on said street, and each of the persons against whom the said complaints were made, as aforesaid, had presented himself for registration, as aforesaid, and had made said affidavit that he resided in a house on a certain street and of a certain number in the city of New Orleans, and nowhere else; that a record of the persons so registered, with the places of their respective residences as aforesaid, was by said laws required to be kept and was kept by said registering officers, the said records being public, and that the persons who made the complaints on which said warrants were issued knew of said records and of the statements they contained in relation to the places of residence of the persons, respectively, who are charged by them in said complaints with having falsely registered by giving as their places of domicile and residence places at which they did not in fact reside; that each of the said persons who made oath to the said complaint did so after inquiry and investigation had been made by them at and about the said alleged places of residence of the said persons whom they charge in said complaints, with having falsely registered by respectively making false statements, as aforesaid, as to their places of residence, and learning, by said investigations and inquiries that the said persons did not at the time of said investigation and inquiry, as aforesaid, reside where they had stated in their said registration affidavits, made a short time, to wit, twenty days, previous to said investigation, that they did reside; that the said election

for which said registration was held had not occurred at the time of the making of said complaints and the issuance of the warrants thereon, and the residences of the said persons as given by them at the time of registration, as aforesaid, had not been changed on their application or otherwise on the said registration records, thus giving the said Southworth, as such commissioner, probable cause to believe that each of the said persons charged in said complaints had falsely, fraudulently, and unlawfully caused himself to be registered as a lawful voter."

If after all this inquiry a strong presumption was not raised that fraudulent registration was being committed, it is very difficult to see what circumstances could be imagined capable of raising such a presumption.

Whether these affidavits might or might not have been made more full and complete than they were it is hardly necessary to inquire.

The Court of Claims has tried them by tests which would, perhaps, be appropriate upon special demurrer to an indictment, but are clearly out of place where it is a mere question whether a committing magistrate had a probable cause of belief that an act of fraudulent registration had been committed. When upon the registration books for a certain ward, or wards, of a city, eight thousand two hundred and eighty-three names were found of persons who after due and diligent search can not be found as residing in that ward, there is certainly grave cause to suspect that their registration is a fraud, and it is not strange that the persons so registered should themselves be suspected of the commission of the fraud, especially when each of the persons have made affidavit to the facts of residence.

It is apparent from the opinion of the Court of Claims that the magnitude of this claim seriously affected the case before that court, but, as we have suggested, that

question will arise when the case comes up for hearing on its merits. If eight thousand two hundred and eighty-three persons were believed by the commissioner upon evidence presented to him to have committed the offense of fraudulent registration, it was his duty to issue that number of warrants, and if a less number than that were so registered, it was his duty to issue such less number of warrants. For whatever he does issue in good faith he is entitled to be paid.

In the case of *Van Buren* v. *United States*, 36 Fed. Rep. 77, an attempt somewhat similar to this was made to defeat the claim of a commissioner for fees by contesting his jurisdiction over the charge. It was said in language quite applicable to this case, p. 78:

"Broadly stated, the proposition of the Government is that its commissioners, at their peril in every instance, whether moved thereto by either party or not, must decide upon the sufficiency of the affidavit presented to confer jurisdiction, and, if a hearing be proceeded in without jurisdiction it shall be without right to compensation, even for the time given to the consideration and decision of that question. To so establish the law would, as it seems to me, impair the public service in this important branch; or if, in many instances, the public interest should not suffer, it would be, as this case strongly illustrates, at the expense of private right. I think the safe and proper rule on this subject must be that if the affidavit is such in form and substance as fairly to call for the deliberate judgment of the commissioner, whether or not a criminal violation of some federal enactment is charged, and the commissioner, in good faith, holding the presentment sufficient, proceeds with the examination, he will be entitled to the fees allowed by law, though it should turn out that his decision was erroneous."

In the present case the court is not required to go so far as in the Van Buren case and hold the commissioner

entitled to fees in a case where he has no jurisdiction of the offense. Here jurisdiction is conceded, and the only question is, must the commissioner's claim for compensation be rejected because the affidavit upon which he acted does not in the opinion of the Court of Claims state all the facts sufficiently to cause a belief in the guilt of the accused? Manifestly not we submit.

It is therefore submitted that the judgment of the Court of Claims be reversed, and the cause remanded with directions to overrule the demurrer and proceed to a hearing on the merits.

LEWIS ABRAHAM,
GEORGE A. KING,
Attorneys for Appellant.

Office Supreme Court U. S.
FILED.
DEC 14 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

CAROLINE SOUTHWORTH, EXECUTRIX of JOHN P. SOUTHWORTH, appellant,
vs.
THE UNITED STATES, APPELLEES.

No. 171. October term, 1893.

BRIEF FOR THE APPELLEES.

J. E. DODGE,
Assistant Attorney-General.
JAMES H. NIXON,
Assistant Attorney.

In the Supreme Court of the United States.

CAROLINE SOUTHWORTH, EXECUTRIX of JOHN P. SOUTHWORTH, appellant.
vs.
THE UNITED STATES, APPELLEES.

No. 171. October term, 1893.

BRIEF FOR THE APPELLEES.

STATEMENT OF THE CASE.

The appellant's testator, John P. Southworth, brought suit in the Court of Claims to recover the sum of $82,060 for fees alleged to be due him for services as circuit court commissioner for the district of Louisiana, the said services having been rendered during the year 1876, and, as appears by Exhibit C, offered by the claimant, and forming part of the record, between the dates of October 26 and November 6 of said year, a period of about twelve days. The services consisted in issuing warrants against persons who were charged with having violated section 5512 of the Revised Statutes of the United States by fraudulently registering as voters. The number of war-

The issue framed by the record in this cause, therefore, resolves itself into two questions:

First. Whether the 8,283 warrants were lawfully issued, and

Second. If lawfully issued, do they constitute a "case" within the meaning of section 1986 of the Revised Statutes, for which a fee of $10 may be legally claimed by the commissioner.

I.

The contention in behalf of the Government is, that these warrants were illegal, and being illegal, the commissioner never became entitled to any fees whatever, for no principle of law is better settled than that an officer can not recover fees for the performance of acts, under color of his office, which are contrary to law, and further, that the affidavits and warrants were so clearly and obviously bad as not to "call for the deliberate judgment of the commissioner whether or not a criminal violation of a federal enactment is charged," a condition conceded by appellant to be essential to earning of fees.

The offenses alleged to have been committed were against the laws of the United States, and were based upon affidavits. The sufficiency of these affidavits is, therefore, a vital question, for if insufficient the warrants were unlawfully issued, the commissioner not having acquired jurisdiction

The amendments afterwards made to the petition could not, of course, improve the character of these affidavits or supply any insufficiency.

In testing the legal character of these affidavits it is important, in view of the provisions of section 5513 of the Revised Statutes, to examine the statute of Louisiana on the subject of registration in force in 1876. This may be found on pages 1 to 22, inclusive, among the acts passed by the general assembly of that State at the first session of the fourth legislature, in 1875, although this act was approved December 23, 1874, and is entitled, "An act to provide for the revision and correction of the lists of registered voters of the State," etc. Previous to the passage of this act a registration law had been in force in that State under which registration books had been prepared which were delivered to the officers appointed under this law, and each year the books of the preceding year were delivered to the officers to be used in preparing the registry lists, as appears by the provisions of said act.

Thus, in 1876 the books of 1875 were delivered to the supervisors for their use. There was a supervisor for each parish in the State, except in the parish of Orleans, where an assistant supervisor was appointed for each ward, having the same duties as supervisors in other parishes. The offices were to be opened in each ward and parish on the last Monday in August preceding each general election. From that time until nine days before the general election the work of registration was carried on, and as a conclusion of the work it is provided as follows:

> SEC. 21. *Be it further enacted, etc.*, That the supervisor of registration for each parish shall carefully examine the registration books, and if upon due inquiry and investigation, he shall find the name or names of any person or persons therein not

In Exhibit C offered by claimant, the dates between which the work was done is eleven days, but any affidavits made previous to the last nine days were doubly illegal, as many changes of residence doubtless occurred during the sixty days while the registration was in progress. The affidavit at the commencement of a criminal procedure must be specific and must aver personal knowledge on the part of the affiant. (See Wharton on Criminal Pleading and Practice, Chap. I, sec. 3, and *State* vs. *Burrell*, 86 Indiana, 313.) But the above figures preclude the possibility of the affiants having had personal knowledge as to the residence of the 8,283 persons complained during the nine days preceding the election.

By the law of Louisiana before cited, two registrations are provided for, section 14 thereof providing for one antecedent to a *general election*, and section 18 for one at a "parish, city, town or ward, election, *other than the general election*." Of course, a United States commissioner has no authority to entertain charges for fraudulent registration under State laws, unless it occurs at an election when *a member of Congress* is to be chosen, and any complaint omitting an averment that a member of Congress was to be elected must be fatally defective. In the affidavit (Exhibit A) made a part of the petition in this case, no such allegation appears, and there is nothing whatever to show that the fraudulent registration charged did not occur at a "parish, city, town, or ward election, other than the general election," provided for under section 18 of the aforesaid act, and not at the general election of 1876 when members of Congress were chosen. The affidavits were,

therefore, essentially worthless and failed to confer jurisdiction upon the commissioner, and any criminal procedure grounded upon such complaints, was unlawful.

That the complaint must adequately charge an offense, is the doctrine laid down by Bishop on Criminal Procedure, section 230, vol. I; and the supreme court of Illinois in *House* vs. *The People* (75 Ill. 587) said, in illustration of this doctrine, "The justice of the peace not having been invested with jurisdiction by the affidavit to issue the warrant, it was void."

It may be answered that the reference to section 5512 in the conclusion of the affidavit cures the defect in the description of the statutory defense, but the rule that such a conclusion, obviously not intended as a statement of fact, can not cure such defect in an indictment will equally apply, we submit, to a complaint upon which criminal proceedings are instituted for the violation of a statute. (See Wharton's Criminal Pleading and Practice, sections 229, 282, and the authorities there cited.)

These warrants are so clearly without authority of law that it can not be contended that a man of ordinary intelligence could have acted in good faith in issuing them.

The crime defined by the statute, §§ 5512, 5513, is the fraudulent registering by the accused at a registration of voters, made under the laws of any State for an election at which a Representative in Congress may be chosen.

The facts alleged by the affidavits are that conplainants have made diligent search, and that ——— does not reside in ——— ward or parish of Orleans ———.

It is not alleged that the accused did register; nor that he had no lawful right to register; nor that the registration books upon which his name appeared were made for an election at which a Representative in Congress might be chosen; nor, indeed, for any election whatever.

It is, of course, perfectly clear that the affiants do not pretend to swear, as to facts, that accused fraudulently obtained registration contrary to law, but merely to express a conclusion from the fact of nonresidence at a certain place.

Even under the most liberal rule contended for by appellant, namely, that if a complaint, though imperfect, is such as to require deliberate consideration and judgment to determine whether, good or bad, it will support commissioner's claim for fees, these complaints fail utterly. No one can for a moment believe that the commissioner considered them sufficient, or that he was acting in good faith, or with any motive save to earn fees, in issuing 8,000 stereotyped warrants upon stereotyped affidavits.

II.

As to the second question, we submit that if the complaints upon which these warrants were issued had been sufficient in law, the commissioner (claimant's testator) would have been entitled to only 77 fees of $10 each, that being the number of persons actually arrested and held for trial or bailed.

By section 1986, Revised Statutes, a commissioner becomes entitled to a fee of $10 for his services in each *case*, inclusive of all services incident to the arrest and examination. It is, therefore, pertinent to inquire what

constitutes a "case" within the evident meaning of this section. The duties to be performed are designated in sections 1982 and 1983. They are to institute prosecutions against all persons *violating* any of the provisions of chapter 7 of the title "Crimes," and to cause such persons to be *arrested and imprisoned or bailed* for trial before the court of the United States or the Territorial court having cognizance of the offense.

It seems very clear from reading these sections that where the "proceedings" mentioned in section 1986 are before a commissioner they include the *arrest of a violator* of the law, and also his *imprisonment or bailment for trial*, to constitute a "case," for the fee is to cover all services *incident to the arrest and examination of a violator* of the law. Where there is no violator of the law found, as in 6903 of these cases, and no arrest made, and no examination before the commissioner and no imprisonment or bailment, clearly there is no "case" within the meaning of the statute for which a fee of $10 may be charged.

As to the 1,303 persons who were found and afterwards discharged, we hold that the arrest of a person who has not violated the law does not constitute a "case" within the meaning of the statute, for if it is only proceedings against actual violators of the law whose arrest has been followed by imprisonment and bailment as provided in section 1982 that constitute a "case," and any proceedings against innocent persons do not constitute a "case" entitling the commissioner to a fee of $10.

Not only is this the manifest meaning of the statutes cited, but this conclusion is in harmony with all the authori-

ties on the subject. It will not be denied by anyone that the word "case," as used in section 1986, is synonymous with the word "cause," and that the meaning of that section would be precisely the same if the word cause were substituted for case. What, then, is the accepted legal meaning of the word "cause?" Bovier says a *cause* is "any question, civil or criminal, contested before a court of justice." Any proceeding, therefore, which is not contested and in which the alleged offender is not even found, as in the 6903 cases, can not be called a case or cause within the legal meaning of the term.

Neither can the proceedings against the 1,303 persons who were arrested and afterwards discharged be held to constitute a cause or case.

In the case of the *United States* vs. *Payne* (147 U. S., 687) the Supreme Court said, in paragraph 8 of the opinion, "A cause in a criminal case is begun by filing an indictment which has been found, but not by one which has been ignored." It will thus be seen that no cause, or case, in a criminal proceeding is even *begun* until an indictment is found, and all cases where indictments are not, are not causes, or cases, for which any charge can be made. This decision demonstrates our contention that the word "case," as used in section 1986, can not be held to authorize a charge of $10 for a mere preliminary step in a criminal proceeding where the alleged offender is not found, or, if found, is afterwards discharged as innocent. It also determines that the meaning of the word "case," or "cause," is a proper subject for judicial construction when found in a statute.

Furthermore, it is quite unreasonable to suppose that while Congress established, by section 847 of the Revised Statutes, a fee of $1 for issuing a warrant by a United States commissioner, it ever intended by section 1986 to allow $10 for the performance of the same duty. It may be fairly argued that Congress intended to furnish an incentive to commissioners to use great diligence in bringing to punishment those who fraudulently register, and therefore fixed this large contingent fee for all cases where the guilty are brought to justice; but it is only when the guilty are found and held or bailed for trial that this fee of $10 can be charged; and this sum can be charged only in cases where jurisdiction of the case has been obtained by the commissioner by virtue of a sufficient affidavit.

A "case" can not arise upon such affidavits as are here presented, for no question thereby assumes a form to enable the judicial power to act upon it. *Osborn* v. *U. S. Bank*, 9 Wheat., 738.

For the foregoing reasons it is submitted that the judgment of the Court of Claims sustaining the demurrer in this case should be affirmed.

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